49 CFR Part 219
Docket No. 2001-11068, Notice No.4
RIN 2130 – AB39

Submission

of the

United Transportation Union

to the

Federal Railroad Administration

in the matter of

a Notice of Proposed Rulemaking

49 CFR Part 219

Docket No. FRA 2001 - 11068
Notice No. 4

T. S. Secord
Canadian Legislative Director

August 25, 2003

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Docket No. 2001-11068, Notice No.4
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SUBMISSION OF THE UNITED TRANSPORTATION UNION (CANADA)

I. The United Transportation Union (Canada) welcomes this opportunity to present its views and concerns on the matter being considered by the Department of Transportation and the Federal Railroad Administration to narrow the scope of the exemptions currently in place for foreign railroad, foreign based (FRFB) employees in respect of the requirements for random alcohol and drug testing.

II. As previously detailed in our submission on this same subject matter, dated February 14, 2002 (attached for ease of reference), the United Transportation Union (Canada) wishes to go on record as being opposed to the lifting of these exemptions, for the same reasons as previously denoted in the aforementioned submission, in addition to the following concerns.

III. Additionally, and as previously stated in our February 2002 submission, we support the right of any sovereign state to apply its laws to the fullest extent within the confines of its own boundaries.

IV. Just as the rights borne from the US Constitution apply to an American citizen regardless of their geographic location on the globe, the same holds true for Canadian citizens in respect of the rights and benefits of citizenship borne from the Canadian Charter of Rights and Freedoms.

NEW EVENTS SINCE FEBRUARY 2002 AFFECTING THIS MATTER

V. Following the submissions of February 2002, a diplomatic note was issued in May 2002 by the Canadian Embassy in Washington, DC objecting to the proposed rule. Subsequent to this objection, the Canadian Human Rights

Commission issued a policy on alcohol and drug testing of workers which is reproduced in pertinent part below:

Canadian Human Rights Commission Policy on Alcohol and Drug Testing Executive Summary

The *Canadian Human Rights Act* prohibits discrimination on the basis of disability and perceived disability. Disability includes those with a previous or existing dependence on alcohol or a drug. Perceived disability may include an employer's perception that a person's use of alcohol or drugs makes him or her unfit to work. The Commission will accept complaints from employees and applicants for employment who believe they have been dismissed, disciplined or treated negatively as a result of testing positive on a drug or alcohol test. Workplace alcohol- or drug-testing policies that contain discriminatory elements may also be the subject of complaints.

Because they cannot be established as *bona fide* occupational requirements, the following types of testing are **not acceptable**:

- Pre-employment drug testing
- Pre-employment alcohol testing
- Random drug testing
- Random alcohol testing of employees in non-safety-sensitive positions.

The following types of testing **may be included** in a workplace drug- and alcohol testing program, but only if an employer can demonstrate that they are *bona fide* occupational requirements:

- Random alcohol testing of employees in safety-sensitive positions.[1] Alcohol testing has been found to be a reasonable requirement because alcohol testing can indicate actual impairment of ability to perform or fulfill the essential duties or requirements of the job. Random drug testing is prohibited because, given its technical limitations, drug testing can only detect the presence of drugs and not if or when an employee may have been impaired by drug use.

- Drug or alcohol testing for "reasonable cause" or "post-accident," e.g. where there are reasonable grounds to believe there is an underlying problem of substance abuse or where an accident has occurred due to impairment from

drugs or alcohol, provided that testing is a part of a broader program of medical assessment, monitoring and support.

• Periodic or random testing following disclosure of a current drug or alcohol dependency or abuse problem may be acceptable if tailored to individual circumstances and as part of a broader program of monitoring and support. Usually, a designated rehabilitation provider will determine whether follow-up testing is necessary for a particular individual.

• Mandatory disclosure of present or past drug or alcohol dependency or abuse may be permissible for employees holding safety-sensitive positions, within certain limits, and in concert with accommodation measures. Generally, employees not in safety-sensitive positions should not be required to disclose past alcohol or drug problems.

In the limited circumstances where testing is justified, employees who test positive must be accommodated to the point of undue hardship. The *Canadian Human Rights Act* requires individualized or personalized accommodation measures. Policies that result in the employee's automatic loss of employment, reassignment, or that impose inflexible reinstatement conditions without regard for personal circumstances are unlikely to meet this requirement.

Accommodation should include the necessary support to permit the employee to undergo treatment or a rehabilitation program, and consideration of sanctions less severe than dismissal.

VI. In respect of the policy issued by the Canadian Human Rights Commission, the rights and benefits of citizenship bestowed upon an individual through their respective Constitution or Charter of Rights are portable and follow the individual within their employment relationship. With this in mind, for a Canadian employer to violate Canadian law with respect to their employees (Canadian), regardless of where that violation takes place, is still a violation. In short, Canadian domiciled railways operating into the United States must still be cognizant of, and respect the law that governs the employment relationship with those Canadian employees affected by any proposed rule.

VII. The concept noted above is fundamental in both Canadian and US law and is a cornerstone of both societies.

VIII. While the United Transportation Union (Canada) was not privy to the multi-lateral discussions between Canada, the United States and Mexico regarding this matter, from our experience on other issues, we are aware that as signatories to the NAFTA Agreement, this issue is not confined merely to DOT/FRA/Transport Canada discussions or oversight. In short, there are other confounding considerations that need to be discussed, in addition to all those cited in our February 2002 submission.

IX. In respect of the pertinent provisions of the NAFTA Agreement, there is room for discussion of a Reciprocity Agreement between the countries who by virtue of their different, but sovereign regulatory instruments, address the issues at hand. While not attempting to belabour the point made in our previous submission, the Railway Medical Rules made pursuant to the Railway Safety Act in Canada meet or exceed the basic tenets of the proposed rule.

OTHER ISSUES ARISING

X. Should the rule as proposed be implemented, in addition to those issues discussed in our February 2002 submission, and although not limited to the foregoing, the following concerns will arise:

a. employees called from a spare list to work trains beyond the proposed 10 mile limit in the United States would fall under the random testing

provisions of the rule – the capturing of these employees under the proposed rule has the same effect as though the rule was applied extra-territorially. In essence, the only way to ensure a proper application of the rule regarding spare employees, or otherwise ensure all are treated in the same manner, is tantamount to having the random testing apply to the entire spare "pool" of employees – in clear violation of the Canadian Human Rights Commission policy.

b. Employers of Canadian based crews caught up in the application of the random portion of this rule will be in violation of that same policy – every day. Although not a litigious society, United Transportation (Canada) can ill afford to sit back and allow such violations to occur, nor will the Canadian Human Rights Commission be allowed to stand for such blatant violations.

c. The provisions of the NAFTA Agreement will come into play, likely undermining the ability of governmental agencies on both sides of the border to implement regulations without excessive interference, and cost.

d. The rights and benefits conferred on Canadians under the Charter of Rights and Freedoms will be undoubtedly sought out, turning this entire issue into something it need not be.

IN CLOSING

XI. While United Transportation Union (Canada) had previously offered several alternatives to the wholesale implementation of the random testing provisions of the proposed rule, given the turn of events, ie...CHRC Policy, diplomatic note, etc..., the United Transportation Union (Canada) submits that the best and simplest manner in which to achieve the basic tenets of the proposed rule is through Reciprocity Agreement with the Canadian government.

XII. It is worthy of note that in the background portion of the NPRM (page 44277) there is mention of the fact that the government of Mexico has "indicated that Mexico would be issuing regulations in the near future that would be compatible with FRA's rules". It is not clear what that means, neither the Mexican government's statement or why their statement was of such importance as to have it published in the background document in the first place. While Canada already has rules in place that more than adequately address the issue at hand, Mexico is contemplating it. Should we not wait to see what the Mexican government comes up with or are we to expect this process to move ahead regardless of their intent. Should Mexico deliver on their statement of intent, does this mean there is then room for reciprocity?

Respectfully submitted on behalf of the United Transportation Union (Canada),

Timothy S. Secord
Canadian Legislative Director

TSS/25/08/03

Submission

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49 CFR Part 219

Docket No. FRA 2001-11068

T. S. Secord
Canadian Legislative Director

Donald G. Tennant
Alternate Canadian Legislative Director

February 14, 2002

EXECUTIVE SUMMARY

1. The United Transportation Union (Canada) is opposed to any rule or other instrument that has the effect of causing employees of Canadian domiciled carriers to be required to submit to random substance testing on other than US soil.

2. The United Transportation Union (Canada) supports the right of a sovereign state to apply its laws to the fullest extent within the confines of its own borders.

3. We are concerned with any usurping effect of jurisdiction or authority such requirements might have on Canadian regulatory authorities, in addition to our concern in respect of the cost to be borne by Canadian taxpayers should Canadian authorities be required to handle the oversight of US regulatory requirements.

4. The Canadian legislative framework far surpasses any jurisdiction within North America in respect of mechanisms that provide for diligent and heightened levels of safety.

5. The railway industry in Canada has the most stringent employee medical requirements of any mode of transportation, under any jurisdiction in North America. These same medical rules provide better mechanisms to handle substance issues while maintaining the personal and human dignity of the employees.

6. There is no demonstrative need, nor is there empirical data that supports the need for random substance testing of employees working for Canadian domiciled carriers, based on Canadian experience. This is underlined by the current absence of such requirements within the industry in Canada and the non-existence of contemplation of any similar requirements by Canadian authorities.

7. Random testing does nothing to stop use or abuse of substances.

8. Practices such as random testing of employees denies the fundamental human rights afforded Canadians under the Human Rights Act and the Canadian Charter of Rights and Freedoms.

9. The benefits associated with such a requirement are outweighed by the costs.

10. Issues such as the chain of custody, laboratory certification, accreditation and education and training are matters that demonstrate the depth of issues that will arise as a result of the implementation of such a requirement and such matters can only be resolved through a consultative process which takes considerable time and expense.

11. Without precedent or prejudice to the issues raised by the United Transportation Union (Canada) in this submission, alternative measures that mitigate some of the most contentious issues are offered for consideration.

SUBMISSION OF THE UNITED TRANSPORTATION UNION (CANADA)

I. The United Transportation Union (Canada) welcomes this opportunity to present its views and concerns on the matter being considered by the Department of Transportation and the Federal Railroad Administration to narrow the scope of the exemptions currently in place for certain operations by foreign railroads from some of the regulatory requirements, specifically, the exemption of the requirements for random alcohol and drug testing.

II. From the outset, the United Transportation Union (Canada) wishes to go on record as being opposed to the lifting of these exemptions for a variety of reasons, which are setout below. We would also like to emphatically state that we support the right of any sovereign state to apply its laws to the fullest extent within the confines of its own boundaries.

EXTRA-TERRITORIAL APPLICATION OF US LAW

III. We are concerned that the lifting of the moratorium on the requirements for random testing inasmuch as it applies to employees of Canadian domiciled carriers is nothing more than an unjustified intrusion upon Canadian legislative sovereignty. Had this matter been of such importance, the Canadian government itself would have exercised its legislative authority and implemented a similar regulatory regimen.

IV. To the contrary, the Canadian government has taken the position that the concept of drug and/or alcohol testing is not of such importance as to consider legislative intervention. The railway industry in Canada has long standing processes in place

V. to address any excursions from normalcy in behaviour as it might apply to the subject matter at hand. Additionally, the industry and labour unions have worked hand in hand to develop such processes that were not only suitable and adequate, but acceptable as well, all under the watchful eye of the regulator and consistent with human rights legislation.

ENFORCEMENT AND COMPLIANCE ISSUES

VI. In respect of enforcement and compliance matters, should such requirements come into force, we are concerned about the jurisdiction of compliance officers and how such requirements are to be enforced, and by whom. Clearly we do not expect US regulatory authorities to audit compliance and/or enforcement on Canadian soil. At the same time we are befuddled as to what legal mechanisms would be put in place to provide for Canadian regulatory authorities to perform compliance audits of a foreign law whose jurisdiction belongs with a foreign authority. Likewise, do the US regulatory bodies desire to pass their oversight authorities onto the regulatory agencies of another country? How is it insured that such agreements or mechanisms comply with other Canadian legislative requirements?

CANADIAN LEGISLATIVE FRAMEWORK

VII. The Canadian legislative framework currently provides under the Railway Safety Act, the mechanisms by which the industry must operate in respect of safety matters. Included within the framework of the Railway Safety Act is a requirement for a Railway Safety Consultative Committee (RSCC), which is a broad-based public forum wherein all interested parties discuss safety related issues. The RSCC is the only broad-based public forum of its kind in North

America. The matter at hand has never been brought before the RSCC as a matter of discussion, which in and of itself speaks volumes to the prioritized placement of this issue within the context of the industry, and the public, within Canada. An issue of such magnitude and scope needs to be brought before the RSCC for discussion before any such requirements could reasonably be expected to be implemented.

VIII. Additionally, the Canadian legislative framework includes statutory rights, duties and obligations such as those found under the Canada Labour Code whereby work place parties have some jurisdiction over safety. How such a requirement could reasonably be expected to comply with those requirements must be worked out prior to any proposed implementation.

MEDICAL RULES

IX. Canada has the most stringent and detailed medical rules for railway employees of any jurisdiction within North America which are required under the Railway Safety Act and which were developed on a consultative basis between the work place parties. The matter of substance testing is addressed within the framework of these rules however there is a significant difference from what is being proposed by the DOT through the FRA, those who are found to have a substance abuse/use issue are still treated with some modicum of human dignity – it is treated as an illness, in compliance with the concept of basic human rights and legislation that addresses this issue which is found throughout most developed countries.

X. Furthermore, the requirements under the Canadian rule are actually more stringent than the US requirement - the Canadian rule is based on prohibition (0 tolerance)

while the US model allows an acceptable level. The requirements of the Canadian rule have been thoroughly explained to the Canadian medical community who play an integral part in the process of ensuring employees are medically fit for duty and are in compliance with the rule, unlike anywhere else in North America.

XI. The Medical Rules currently in place in Canada were adopted under the framework of the Railway Safety Act and as such are subject to oversight by regulatory authorities. These same rules clearly define differing levels of employees based on selected criteria. The criteria for the most part, determined who was "critical" to safe railway operations and who was "sensitive" to safe railway operations. These rules and the criteria were cognizant of the requirements of human rights legislation and jurisprudence at the time the rules were developed.

XII. The medical rules and the guidelines that the Chief Medical Officer of each of the respective railways have developed to implement such rules, are the most comprehensive of any similar jurisdiction in North America. To place an add-on to these rules (such as the random testing requirements) after their well thought out development and implementation is foolish, and an unrealistic burden and expectation of the industry and its employees in Canada. Had the issue of drug/alcohol random testing been an issue within the industry (or country), the rules would have been developed with this in mind. Such was not the case however.

XIII. The lack of empirical data to suggest there is a problem of such a magnitude within the railway industry in Canada concerning drug/alcohol use or abuse is

indicative of the reasons why the medical rules in Canada treat this area of concern as a disease, with dignity, not as some shotgun approach that condemns the innocent whilst doing nothing to either catch the guilty or more importantly – eradicate the problem.

TRADE DISPUTE

XIV. While there may be some argument as to whether or not the instant matter can be seen as an unfair trade practice, there remains no doubt the matter can be brought forward as such a dispute before various international bodies.

HUMAN RIGHTS AND CIVIL LIBERTIES

XV. The Canadian government has had the foresight to stay away from imposing legislation that would ultimately challenge the basic human rights of an individual under accepted international standards. That foresight, coupled with the seeming lack of importance given to the matter of drug testing relative to safety issues has until now, kept such intrusive procedures and/or requirements off the shelves of Canadian legislative requirements.

XVI. There have been numerous cases brought before the Human Rights Tribunal in respect of drug/alcohol testing, several of which have been subsequently heard by the Federal Court of Canada with varying degrees of success and/or failure. The point being made here is such that even if a US requirement is applied to employees of Canadian domiciled carriers, it is not, in and of itself, unfettered from challenges that may be brought before the Canadian or international judicial systems, whether based on the Charter of Rights and Freedoms, the Human Rights

Act, the Constitution Act and/or any other Canadian or international legal standard or authority.

COST

XVII. Should the moratorium be lifted, thereby including employees of Canadian domiciled carriers in a random test pool, clearly this will be an added economic burden to the carriers not currently experienced by them. The cost of the tests, education, training, information and loss in productivity is not within the realm of realistic or acceptable limits on a cost/benefit analysis, nor upon reviewing the industry's experience on matters concerning substance use/abuse. We do not believe it serves any meaningful purpose to have the Canadian railway industry create a cottage industry for laboratories to perform testing as a result of an imposed requirement on them, and their employees by a foreign, sovereign state. A requirement we might add, that has no foundation in the context of Canadian railways, based on our experience.

CHAIN OF CUSTODY

XVIII. Not unlike the concerns previously expressed by this office in 1996 in representations to the Federal Highway Administration (FWHA) in response to the DOT's final rule on Controlled Substances and Alcohol Use and Testing; Foreign-Based Motor Carriers and Drivers under 49 CFR Part 382, we continue to have concerns about the chain of custody that might be used should the moratorium on random testing for railways be lifted.

LABORATORY CERTIFICATION

XIX. Not unlike that as noted above, we also have concerns about the certification of laboratories that would be required or otherwise handle any collection samples. Would they be certified based on US or Canadian criteria, and who would provide the certification – a Canadian governing body, or one from the US? Should it be based on Canadian criteria, and/or by a Canadian authority, considering that this involves the railway industry – the matter falls within the scope and/or purview of the RSCC. Furthermore, considering that this may in fact be considered a matter relative to occupational safety and health of employees (of a railway), the matter also falls under the purview of the requirements as setout in the Canada Labour Code Part II. As one might appreciate, this is not a simple matter. Once again, the matter of jurisdiction for inspection, testing, maintenance, compliance and auditing processes comes to the fore.

EDUCATION AND TRAINING

XX. Insofar as the possible implementation of such a requirement as contemplated by the DOT through the FRA, who will provide what form of education and training, at whose expense? How is the training developed and by whom? At whose expense? There are numerous questions that arise in this regard, not to mention our concern that the requirements of any ratified ILO Conventions and any contractual language or other agreement are met.

ALTERNATIVE MEASURES

XXI. In the event all of which we have stated herein falls on deaf ears and the FRA/DOT move forward with their proposal to remove the exemptions currently

in place, thereby adversely affecting employees of foreign railways, the United Transportation Union (Canada), notwithstanding our concerns previously expressed, offer the following as an alternative to the wholesale inclusion of employees of Canadian railways, solely as a means to mitigate the adverse effect such a decision would have on those employees. The alternatives setout below should not be construed as any measure of acquiescence or acceptance on our part of the revocation or modification of such exemption. Such alternatives are offered without prejudice or precedent.

a.) Any consideration for repeal or modification of the exemption currently in place should only be considered to the extent that such modification would capture or include only those employees of Canadian railways who operate onto US soil. These employees could be determined by cross-referencing USRRB information that is filed with that Board.

b.) Any application of the modified exemption, in the event the above is not a consideration, should be limited to a geographical area along the Canada-US border that reflects those areas or terminals where employees have a reasonable likelihood of entering into international service, and only then when employees of a given terminal within that geographic boundary actually have a likelihood of entering the US.

XXII. Any requirements that affect a pre-determined group of affected employees who are subjected to the random testing requirements should also be applied to the supervisors of those same employees. In other words, the supervisors of the

employees captured by the criteria for random testing should be included in the test pool as well.

XXIII. The scenarios listed above are offered only as alternatives to the wholesale, across-the-board application of the US requirements for random testing of all employees of Canadian railways who engage in international, trans-border shipments.

XXIV. Consideration must be given to those situations where not all railways or railway terminals on the Canadian side of the border actually engage in moving traffic over the border. In other words, not all terminals on the Canadian side of the border actually pull cars into the US. In such instances it would not be a useful exercise to burden such situation/employer/employees with the contemplated regulatory or rule requirements.

XXV. Hence, even if they (employees) were within a defined boundary as suggested above, it would not make much sense including them in a pool of employees for testing purposes. Obviously there would be an additional cost involved in including such employees and the resultant data could be skewered as a result of having persons in the pool that never actually worked on US soil

Respectfully submitted by Timothy S. Secord, Canadian Legislative Director, on behalf of the United Transportation Union (Canada).

TSS/07/02/2002